(1)

Supreme Court, U.S.
FILED

05-113 MAY 16 2005

OFFICE OF THE CLERK

NO.

SUPREME COURT OF THE UNITED STATES

October Term 2005

JACK R. FINNEGAN, Petitioner

v.

RICHARD DE FRANCISCO, et al., Respondent

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Jack R. Finnegan
In pro se
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San Clemente, CA
949-492-3837

QUESTION PRESENTED

1. Can anyone possibly say that purposely attempting to destroy the rights of petitioner or destroying petitioner's case in a courthouse by failure to be faithful to established law is not an attack on our system of law?

2. Was it reversible error for petitioner to be denied the right of due process, and equal protection of the laws of the State of California, the California State Constitution and the United States Constitution?

3. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court omitted and misstated material facts in the petitioner's brief?

4. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court failed to mention material facts in the petitioner's brief?

5. Did the California Supreme Court, deprived petitioner the right of due process, and equal protection of the laws in a rush to judgment by refusing to hear petitioner's Petition for Review, when the Appellate court raised new issues without affording petitioner to file a supplemental brief.

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TABLE OF AUTHORITIES

California Rules of Court, Rule 29(b)

California Government Code §68081

San Francisco v. Pacific Bank (1891) 89 Cal. 23, 25, 26 P. 615, 835

In Regards Jessup (1889)81 Cal. 408, 471-472, 21 P. 976, 22 P. 742, 1028

Louisell and Degan, Rehearing in American Appellate Courts, 44 Calif.. L. Rev. 627 (1956)

APPENDIX

APPENDIX A The final judgment of the California Supreme Court.

APPENDIX B The denial for rehearing in the Court of Appeal, State of California, Fourth Appellate District, Division Three.

APPENDIX C The Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division Three.

OPINIONS BELOW

The final judgment of the California Supreme Court was entered on February 16, 2005. The denial for rehearing in the Court of Appeal, State of California, Fourth Appellate District, Division Three, was entered December 10, 2004. The Opinion of the Court of Appeal, State of California, Fourth Appellate District, Division Three, was entered November 12, 2004

JURISDICTION

The jurisdiction of this Court rests with Title 28 United States Code Section 2104.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution Article III, Section 2, The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, and the Laws of the United States;...

Fifth Amendment. No person shall be... nor be deprived of life, liberty, or property, without due process of law;...

Fourteenth Amendment. No persons born... deprive any person...without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

California Rules of Court, Rule 29(b) provides for rehearing on any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, or any misstatement by the Court of Appeal of any issue or material fact, or the court's failure to mention an issue or material fact.

California Government Code § 68081, If the court fails to afford the opportunity, a rehearing is required to be ordered on timely petition of any party.

STATEMENT OF THE CASE

HISTORY OF THE LITIGATION

This lawsuit began as a direct result of an upper landowner diverting the natural water flow onto the lower landowner's property causing two landslides, approximately 30 months apart. The first lawsuit was improvidently and improperly dismissed. The second lawsuit was destroyed 18 days before trial when a non-trial judge exceeding his authority to do so improvidently and improperly excluded the expert testimony of petitioner, a licensed Architect, licensed General Contractor with over 50 years of experience.

FEDERAL QUESTIONS

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases during pretrial procedures.

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases before the Appellate Court.

The federal question of Constitutional basic and fundamental right of due process and equal protection of the laws was first raised in each of the two cases before the California Supreme Court.

REASONS FOR GRANTING THE WRIT

The petition should be granted because this case presents the important issue of equal justice under the law being denied and because a most basic and fundamental right of due process and equal protection of laws to obtain justice arising from certain remedy in the law have been denied.

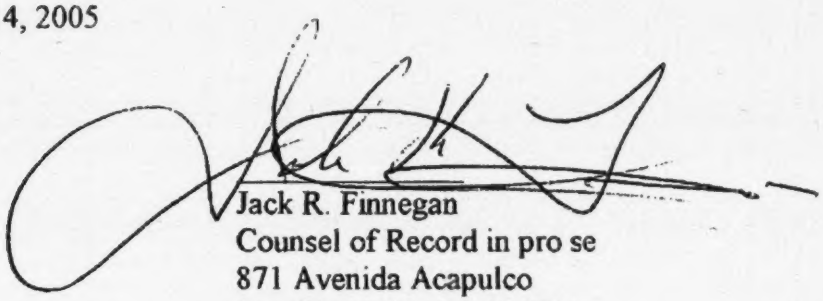
CONCLUSION

The preamble of the Code of Judicial Ethics requires no less than the Constitutional issue of due process and equal protection of laws under the Fifth and Fourteenth Amendments. "Our system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible member of government under the rule of law."

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to California Superior Court for trial on merit.

Respectfully submitted

May 14, 2005



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SUPREME COURT OF THE UNITED STATES

October Term 2005

JACK R. FINNEGAN, Petitioner

v.

RICHARD DE FRANCISCO, et al., Respondent

CERTIFICATION OF COMPLIANCE

The Petition for Writ of Certiorari is proportionately spaced, of Roman type, 11 point type size, with at least 2-point leading between lines and a word count of 1,016 words, margins of 1.0" each side, 1.125" at top and 1.0 at the bottom. The paper is white, at least 60-pound weight.

May 14, 2005

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APPENDIX A

Court of Appeal, Fourth Appellate District, Division Three - No. G033230
S130484

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JACK R. FINNEGAN, Plaintiff and Appellant,

v.

RICHARD DE FRANCISCO, Defendant and Respondent.

Petition for review DENIED.

SUPREME COURT
FILED
FEB 16 2005

Frederick K. Ohlrich Clerk

GEORGE
Chief Justice

APPENDIX B

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

COURT OF APPEAL.4TH DIST Div 3
FILED
DEC 10 2004

JACK R. FINNEGAN,
Plaintiff and Appellant,

G033230

Sup. Ct.No. 794705

v.

ORDER

RICHARD DeFRANCISCO et al.,
Defendants and Respondents.

The petition for rehearing is DENIED.

SILLS, P.J.

WE CONCUR:

ARONSON, J.

IKOLA, J.

APPENDIX C

FILED
NOV 12 2004
Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

JACK R. FINNEGAN, G033230
Plaintiff and Appellant,

v. (Super. Ct. No. 02CC03282)

RICHARD DE FRANCISCO, et al., OPINION
Defendants and Respondents.

Appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Affirmed.
Jack R. Finnegan, in pro per for Plaintiff and Appellant.
Callahan, Mc Cune & Willis and James M. Hansen for Defendants and Respondents.

Appellant Jack R. Finnegan sued his up-slope neighbors, the De Franciscos, for causing a landslide to slump onto his own down-slope property. As plaintiff and owner of the allegedly

damaged property, counsel for the defendants deposed Finnegan in his role as *percipient* witness. That deposition garnered two days worth of testimony.

Subsequently, because Finnegan was also playing the role of his own lawyer, he designated himself as an expert witness in the case. The case called for expert witnesses because of geotechnical, architectural, and complex construction defect issues.

It should be noted here that Finnegan had every right to designate himself as an expert and he was more than qualified to act in such capacity. Finnegan is an architect and engineer. He worked in the construction industry for over *50* years and has over 20 years experience serving as an arbitrator for the American Arbitration Association.

However, as a result of Finnegan's designating himself as expert witness, the De Franciscos sought to take his deposition *in that capacity.* But Finnegan refused to submit to the deposition because he thought he had already provided enough testimony and did not want to give defendants' counsel "another bite of the apple." So he didn't show up.

Consequently, at trial,1 defendants objected to Finnegan serving as his own expert witness. (See Code Civ. Proc., § 2034, subdivision (j)(4) [mandatory exclusion of testimony of expert witness if party fails to make expert available for deposition].)

Finnegan now contends that it was an abuse of discretion for the trial court to exclude his testimony as an expert witness. He makes two arguments.

First, he claims that he already provided two days worth of testimony and 390 pages of testimony, and anything more would be unreasonable and constitute harassment. The argument is predicated on section 2024, subdivision (a) of the Code of

1. Finnegan's motion to augment the record on appeal to include the reporter's transcripts of certain pre-trial proceedings is granted.

Civil Procedure, section 2024, subdivision (a), which states, "As used in this section, discovery is completed on the day a response is due or on the day a deposition begins."

Finnegan has simply (and quite literally) misread the statute. In context, the phrase "discovery is completed" is not referring to a particular deposition, but to the official cut-off point beyond which

further discovery cannot be conducted without leave of court. The portion of the statute upon which Finnegan relies is taken out of context. (For an example of the ludicrous results that can obtain when language is taken out of context, see *Halbert's Lumber, Inc. V. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1245, fn. 9 [story of Victorian preacher who took phrase "let him-which is on the housetop not come down" and converted it to mean that women could not wear their hair in "top knots", as in "top not come down"].) There is no issue in this case that Finnegan's deposition as an expert witness was scheduled inside the verboten discovery cut-off period to which Civil Code section 2024 actually applies.

Moreover, even if the statute were a limit (one-day) on the length of a deposition, it would not have justified Finnegan's refusal to show up at the deposition. His previous deposition testimony was entirely devoted to his role as *percipient* witness. No sensible reading of a rule limiting deposition time (e.g., Fed. Rule Proc. 30(d)(2) [normal time for deposition is one day of seven hours]) would allow a party to sandbag his or her opponent by dividing himself or herself into, in effect, two witnesses, one percipient and one expert. If that were possible, in theory a litigant could cut in half the time which his or her opponent would have for a deposition.

Second, Finnegan claims that his testimony as an expert witness was protected by the work product privilege. He specifically relies on Code of Civil Procedure, section 2018, subdivision (c), the language therein saying, "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." Finnegan asserts that he did not have to submit to the deposition because the testimony that would be elicited was protected by the attorney work product doctrine.

But Finnegan's ideas, notes, and conclusions were protected under the work-product doctrine *only to the extent* they were derived from his *role as an attorney*. The work product doctrine cannot provide protection to Finnegan's impressions as an expert. Were the rule otherwise, the law again would be frustrated by the simple expedient of a party choosing both to represent himself as an attorney and be his own expert witness.

As a final matter, we note that the trial court had no choice

but to exclude Finnegan's testimony *qua* expert witness. According to Code Civil Procedure section 2034, each party to a lawsuit may designate an individual as an expert witness to assist with the implementation of his or her case. The designating party must make its expert witnesses known to opposing counsel by way of a designation. (Code Civ. Proc. § 2034, subd. (f)). Once the designations are made, the opposing side becomes *entitled* to take the deposition of the expert witness with regard to his expertise. (Code Civ. Proc., § 2034, subd. (i).)

And if that entitlement is unreasonably thwarted, the court has no choice but to dismiss. The consequences for failure to submit one's expert to a deposition are mandatory: "The trial court *shall* exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: ... [¶] (4) make that expert available for a deposition." (Code Civ. Proc. §2034(j), emphasis added.) Judge Monarch merely applied the statute's plain words.

Without expert witness testimony Finnegan had no case. The judgment is affirmed. The De Franciscos will recover their costs on appeal.

SILLS, P.J

WE CONCUR:

ARONSON, J

IKOLA, J